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No. 08-479

In The Supreme Court of the United States

SAFFORD UNIFIED SCHOOL DISTRICT #1; KERRY WILSON, Husband; JANE DOE WILSON, Wife; HELEN ROMERO, Wife; JOHN DOE ROMERO, Husband; PEGGY SCHWALLIER, Wife; JOHN DOE SCHWALLIER, Husband,

Petitioners,

v.

APRIL REDDING, Legal Guardian of Minor Child,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE URBAN JUSTICE CENTER, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, ADVOCATES FOR CHILDREN OF NEW YORK, AND THE NATIONAL YOUTH RIGHTS ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI*[1]

The Urban Justice Center (UJC) is a not-for-profit legal services organization organized under the laws of the State of New York that provides free civil legal assistance to indigent clients in domestic violence, landlord-tenant, public assistance, and education matters. The UJC represents indigent youth in disciplinary proceedings in schools and in civil actions arising from strip searches in those schools and has an interest in ensuring that school officials follow the laws concerning such searches.

The Asian American Legal Defense and Education Fund (AALDEF), headquartered in New York City and founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF's Educational Equity and Youth Rights Project promotes the rights of Asian American students in kindergarten through twelfth-grade public education. AALDEF counsels high school students about their rights and represents them in disciplinary hearings.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are lodged herewith.

Advocates for Children of New York (AFC) is dedicated to ensuring access to the best education New York City can provide for all students. For over thirty-seven years, AFC has been working with low-income families in New York City to secure quality and equal public education services for their children. AFC provides a range of direct services, including free individual case advocacy, technical assistance, and trainings, and also works on institutional reform of educational policies and practices through advocacy and litigation.

The National Youth Rights Association (NYRA) is a not-for-profit organization founded in 1998, with nearly 10,000 members. NYRA is truly youth-led, as most of its membership and members of its board of directors are high school or college students. NYRA works to educate and empower students across the country to better ensure the protection of their civil rights and liberties.

SUMMARY OF ARGUMENT

Amici curiae write in support of Respondent in this action, April Redding, the mother of Savana Redding (Ms. Redding), in a challenge to the treatment Ms. Redding received as a pupil in middle school. Such treatment included a strip search by school officials based on the slenderest reed of suspicion: the allegations of another student accused of the same infraction, here, the possession of several pills

of prescription strength medicine. Ms. Redding had no prior disciplinary record and posed no threat to school security at the time of the search.

Historically, teachers have enjoyed certain powers over the children under their care, but such powers did not—and should not now—extend to permit the treatment carried out by Petitioners in this case. This brief reviews the common law traditions that, for centuries, guided teacher conduct in the treatment of students entrusted to their care. This brief concludes that these traditions would not have authorized the strip search of Ms. Redding challenged below.

For nearly the last fifty years, courts have reviewed the treatment of students by school officials using constitutional principles such as the rights to due process and privacy and the freedom from unreasonable searches and seizures. Prior to viewing the student-teacher relationship through the constitutional prism, however, U.S. courts assessed teacher treatment of pupils under principles of tort law, using the *in loco parentis* doctrine. Under this doctrine, the teacher stood in the place of parents in attending to the education of the children in his or her care, but could impose restrictions on and punish such children only if such treatment was reasonable. Although state courts across the nation used different tests to determine the propriety of teacher treatment of pupils, in the end, such treatment was always measured by this simple standard: whether such treatment was reasonable under the circumstances.

The historical record reveals that when measured by this common law standard of reasonableness, the treatment of Ms. Redding was improper. It was also unlikely to have occurred at all when the common law was in force. Whether based on common law traditions that limited the treatment of pupils to what was reasonable, teacher handbooks that instructed teachers to treat students reasonably and with decency, or American educational traditions that promoted the passing on of such values as modesty to students, the likelihood that teachers sought or exercised the right to strip search students is slim.

Indeed, *amici curiae* are aware of no reported case under the common law in which a teacher attempted to strip search a pre-teen girl. It is respectfully submitted, however, that such treatment was so unreasonable that teachers did not seek, nor did they obtain, authority to engage in such conduct. Under the common law, in the only reported case of which the *amici curiae* are aware under the *in loco parentis* doctrine that involved the disrobing of an adolescent girl, there by an adoptive father, the Supreme Court of Michigan found the parent's treatment utterly unreasonable and allowed the parent's *criminal* conviction for assault and battery to stand.

Today, searches of students in schools are measured against modern Fourth Amendment principles. But those principles have long been informed by the common law, and the historical review that follows illuminates how the common law would have treated the search of Ms. Redding. Furthermore, through a

review of modern Fourth Amendment jurisprudence dealing with searches of students in schools, one is presented with a modern understanding of what searches are appropriate in the school setting and what are not. This modern understanding actually comports with the common law tradition: what is proper is determined by what is reasonable under the circumstances. In fact, when assessing the reasonableness of school practices, common law courts required that any treatment of students had to be proportional to the offense, could not cause lasting injury, and could not be excessive. Similarly, modern courts have required the presence of exigent circumstances to justify strip searches in schools. Under both historical principles and Fourth Amendment jurisprudence, a school action as invasive and intrusive as a strip search is acceptable only when a heightened level of reasonable suspicion is present and only in the most extreme circumstances.

Assessing the facts and circumstances in the instant case against the common law traditions that guided teacher treatment of their students for centuries, and more modern Fourth Amendment jurisprudence surrounding searches of students in schools, the treatment of Ms. Redding was unreasonable and thus, unconstitutional. Accordingly, this brief of *amici curiae* respectfully requests that this Court affirm the decision of the Ninth Circuit Court of Appeals sitting *en banc*.

STATEMENT OF THE CASE

Thirteen-year-old Savana Redding was an eighth grader at Safford Middle School in Safford, Arizona. J.A. 21a; Pet. App. 2a. Ms. Redding was an honors student who had never been disciplined for violating school policy. J.A. 21a.

On October 8, 2003, Safford Middle School Assistant Principal Kerry Wilson removed Ms. Redding from class and led her to his office for questioning. *Id*. When they arrived, Ms. Redding saw her planner on Wilson's desk along with a cigarette, lighters, and knives. *Id*. at 22a. Ms. Redding told Wilson the planner was hers, but the other items were not. *Id*. Ms. Redding described how she had lent that planner to her classmate, Marissa Glines, so Ms. Glines could hide certain items from her parents. *Id*.

Wilson questioned Ms. Redding about prescription ibuprofen pills delivered to Wilson by another student. *Id.* at 12a, 13a. Possession of prescription medication without permission was a violation of school policy. *Id.* Ms. Redding insisted that she knew nothing about these pills, had never brought prescription pills to school, and had never given pills to others. *Id.* at 22a.

Ms. Redding's spotless school disciplinary record notwithstanding, Wilson asked her if he and his assistant, Helen Romero, could search her backpack. *Id.* Redding consented. *Id.* Nothing was found. *Id.* Regardless, Wilson ordered the strip search of Ms. Redding. *Id.*

The search was conducted by the school nurse in her office at the direction and in the presence of Romero. *Id.* Ms. Redding was required to take off her socks, shoes, and jacket for inspection. *Id.* at 23a. The women instructed Ms. Redding to take off the stretch pants and t-shirt she was wearing. *Id.* at 22a. "Embarrassed and scared," Ms. Redding did as the women said and, on the verge of tears, was made to "pull her bra out to the side" and "her underwear at the crotch" and shake them to dislodge any hidden pills. *Id.* at 24a. This required Ms. Redding to "expose[ ] her naked breasts" and "pelvic area" to the women who did not turn away, thus adding to her humiliation. *Id.* Nothing was found. *Id.* at 23a.

When later asked about the "most humiliating experience" of her life, Ms. Redding testified that she complied with the nonconsensual strip search because she thought that she "would be in more trouble if [she] did not do what they asked." *Id.* at 25a.

The decision to interrogate and later strip search Ms. Redding came after a student, Jordan Romero, who had produced a pill, informed Wilson of a plan by students to take ibuprofen at lunchtime. *Id.* at 12a. This student implicated Ms. Glines, not Ms. Redding. Pet. App. 6a, 7a. Wilson questioned Ms. Glines who turned over the planner lent to her by Ms. Redding. J.A. 12a. A search of it revealed no pills. *Id.*

A search of Ms. Glines' person uncovered ibuprofen and an additional blue pill in her pockets. *Id.* Ms. Glines stated that the blue one must have "slipped in

when [Ms. Redding] gave me the" ibuprofen. *Id.* at 13a. Ms. Glines provided no further information regarding when or where Ms. Redding allegedly gave her the pills. Pet. App. 8a. Ms. Glines was then subjected to a less invasive strip search than was conducted of Ms. Redding. J.A. 16a. Ms. Glines' statement was the only basis for the humiliating search of Ms. Redding.

PROCEDURAL HISTORY

The underlying suit was commenced in the United States District Court for the District of Arizona against the Safford School District and the three school employees. *Redding v. Safford Unified Sch. Dist.*, 531 F.3d 1071, 1077-78 (9th Cir. 2008). The District Court granted summary judgment in favor of the defendants, which was affirmed by a divided panel of the United States Court of Appeals for the Ninth Circuit. *Id.* at 1078. The Ninth Circuit, however, sitting *en banc*, vacated the panel's decision and held that "[t]he strip search of thirteen-year-old Savana did not satisfy either prong of [*New Jersey v.*] *T.L.O.*[, 469 U.S. 325 (1985)] and therefore was conducted in violation of Savana's Fourth Amendment rights." *Safford*, 531 F.3d at 1089.

ARGUMENT

I. HISTORICALLY, THE COMMON LAW PROHIBITED TEACHERS ACTING *IN LOCO PARENTIS* FROM ENGAGING IN TREATMENT OF THEIR STUDENTS THAT WAS UNREASONABLE.

As this Court noted in *Ingraham v. Wright*, 430 U.S. 651 (1977), from the early days of the republic, treatment of students by school officials was governed by the common law doctrine of *in loco parentis*. *Id.* at 661-62; *see also Bowers v. State*, 389 A.2d 341, 348 (Md. 1978). Parents had a duty to educate and raise their children, and this duty was delegated to school officials who stood "in the place of the parents" while children were entrusted to those officials' care. 2 James Kent, Commentaries on American Law *203; *State v. Pendergrass*, 19 N.C. 365, 367 (1837). Sir William Blackstone described the relationship between student and teacher in his commentaries as follows:

> [The parent] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.

1 William Blackstone, Commentaries on the Laws of England *453.

American common law adopted the *in loco parentis* doctrine. *Pendergrass*, 19 N.C. at 367; *Commonwealth v. Randall*, 4 Gray 36, 38-39 (Mass. 1855). James Kent treated the doctrine nearly identically to Blackstone: "[T]he power allowed by law to the parent over the person of the child may be delegated to a tutor or instructor, the better to accomplish the purpose of education." 2 James Kent, Commentaries on American Law *205.

The authority delegated from parent to teacher was not limitless, however. As the following discussion shows, and as this Court's opinion in *Ingraham, supra,* recognized, under the common law, a single principle guided the treatment of students by teachers acting *in loco parentis*: such treatment must have been reasonable. 430 U.S. at 661.[2] What follows is an historical overview of the common law doctrine of *in loco parentis*. This overview recounts the historical treatment by the courts of the relationship between teacher and student. It also offers evidence that teachers were expected to treat their students with respect and decency, and to impart the values of modesty and humility. The historical record is mostly silent as to the legitimacy of strip searches of students under the common law, however. When viewed against the landscape of the common law and the

[2] Whether the strip search in the instant case would have been assessed under the common law with respect to its reasonableness even though it did not involve corporal punishment *per se* is addressed in Section I.D., *infra*.

backdrop of American educational traditions and values, this absence strongly suggests that such acts were hardly common, and were certainly not condoned.

A. Two Lines of Cases Emerged that Outlined the Scope of Reasonableness in the Teacher-Student Context.

Two lines of cases emerged defining the contours of reasonableness in the educational context. *Morse v. Frederick*, 127 S.Ct. 2618, 2631-33 (2007) (Thomas, J., dissenting); *see also People v. Curtiss*, 300 P. 801, 802-03 (Cal. App. Dep't Super. Ct. 1931). The first, following the decision in *Pendergrass*, *supra,* held that a teacher's treatment of a student was reasonable unless it caused permanent injury or was carried out with malicious intent. 19 N.C. at 367. The second, which was consistent with the Supreme Court of Vermont's decision in *Lander v. Seaver*, 32 Vt. 114 (1859), and was the prevailing precedent in a majority of states, held that a teacher acted unreasonably unless reasonable men would consider the treatment in question excessive. *Id.* at 123. Under either line, reasonableness was a question left to the jury. *See Dean v. State*, 8 So. 38, 39 (Ala. 1890); *State v. Straight*, 347 P.2d 482, 490 (Mont. 1959); *Clasen v. Pruhs*, 95 N.W. 640, 642 (Neb. 1903); *Drum v. Miller*, 47 S.E. 421, 435 (N.C. 1904); *State v. Jones*, 95 N.C. 588, 589 (1886); *State v. Speigel*, 270 P. 1064, 1065 (Wyo. 1928).

1. The *Pendergrass* line of cases held that reasonable treatment by a person standing *in loco parentis* could not cause lasting injury nor be the product of malicious intent, and in one such case, a strip search of a preteen girl was found unreasonable.

Under *Pendergrass*, the *in loco parentis* doctrine deemed treatment unreasonable, and thus illegal, where it caused lasting injury or was the product of malicious intent. *See Boyd v. State*, 7 So. 268, 269 (Ala. 1890); *Dodd v. State*, 126 S.W. 834, 835 (Ark. 1910); *Drake v. Thomas*, 33 N.E.2d 889, 891 (Ill. App. Ct. 1941); *People v. Green*, 119 N.W. 1087, 1089 (Mich. 1909); *Heritage v. Dodge*, 9 A. 722, 723 (N.H. 1887); *State v. Thornton*, 48 S.E. 602, 602-03 (N.C. 1904); *Pendergrass*, 19 N.C. at 367; *Marlar v. Bill*, 178 S.W.2d 634, 635 (Tenn. 1944).

For example, a number of courts following *Pendergrass* allowed juries to infer malice from treatment that was "unreasonably severe." *E.g.*, *Boyd*, 7 So. at 270; *Green,* 119 N.W. at 1090; *State v. Koonse*, 101 S.W. 139, 142 (Mo. Ct. App. 1907). Similarly, where the punishment exceeded the gravity of the infraction, the Supreme Court of Alabama upheld the conviction of a teacher who beat a student for swearing. *Boyd*, 7 So. at 271. In so holding, the *Boyd* court concluded: "From this unseemly conduct on the part of one whose duty it was to set a good example of self-restraint and gentlemanly deportment to his pupils, there was ample room for the inference of legal

malice, in connection with *unreasonable* and *immoderate* correction." *Id.* (emphasis added).

Admittedly, under the common law, reported cases involving strip searches of students are rare. But in the one reported case *amici curiae* could locate that involved the disrobing of a young girl, the court there applied the *in loco parentis* doctrine to assess the treatment of a twelve-year-old girl by her adoptive father. *Green*, 119 N.W. at 1087. There, the Supreme Court of Michigan applied *Pendergrass* to uphold the criminal conviction of a father who assaulted his daughter for the alleged theft of a fifty-cent piece. *Id.* at 1087, 1090. The father, after his daughter refused to admit to stealing the money, forced her to strip naked, whipped her, and left her bound for nearly two days. *Id.* at 1087-88. In ruling that the evidence could sustain the conviction, the court held that "[i]t is sufficient to show that the punishment was cruel and unreasonably severe, and such as in its very nature would negative the idea of good faith on the part of the parent." *Id.* at 1090.

Clearly, the facts surrounding the treatment in *Green* are easily distinguished from the search in the instant case because there, the defendant not only stripped his daughter, but also beat her. But the *Green* court was deeply concerned by the act of forcing the girl to disrobe. Indeed, the court described that conduct as "one of the most serious elements of the respondent's offense . . . [which] tended to shock [the victim's] modesty, to break down her sense of decency and the inviolability of her person." *Id.* When

viewed in the light of the sensibilities of the times, the *Green* court's clear discomfort with the disrobing of the girl, coupled with the absence of other precedent dealing with similar situations, suggest not only the extreme nature of such treatment, but also its rarity.

Thus, the *Pendergrass* line of cases applied a reasonableness standard under the *in loco parentis* doctrine to place limits on the authority of teachers in their interactions with, and treatment of, their students. In the one case that involved the disrobing of a young girl, the court found such conduct not only utterly unreasonable, but also criminal.

2. The *Lander* line of cases held that a teacher's treatment of a student was unreasonable if it resulted in injury that was "clearly excessive."

The *Lander* line of cases held that treatment of a child by one standing *in loco parentis* was unreasonable when it went beyond "moderate correction"; when it did, it was considered "clearly excessive" and illegal. *Sheehan v. Sturges*, 2 A. 841, 842 (Conn. 1885); *State v. Vanderbilt*, 18 N.E. 266, 267 (Ind. 1888) ("[W]here . . . the punishment is not administered with unreasonable severity, a proceeding for an assault and battery cannot be maintained against the teacher."); *Cooper v. McJunkin*, 4 Ind. 290, 291-92 (1853); *State v. Fischer*, 60 N.W.2d 105, 109-10 (Iowa 1953); *Fabian v. Maryland*, 201 A.2d 511, 518 (Md.

1964); *Patterson v. Nutter*, 7 A. 273, 274-75 (Me. 1886); *Anderson v. State*, 3 Tenn. (3 Head) 455 (1859) ("Nor must his chastisements be cruel or excessive, but reasonably proportioned to the offense, and in the bounds of moderation."); *Lander*, 32 Vt. at 120; *Hathaway v. Rice*, 19 Vt. 102, 107 (1846) ("[T]he right of a school master to correct his scholar [is] a right which has always been practically and judicially sanctioned. But it . . . must not exceed the limits of a moderate correction."); *Carpenter v. Commonwealth*, 44 S.E.2d 419, 423 (Va. 1947) ("[T]he great preponderance of authority is to the effect that a parent has a right to punish a child within the bounds of moderation and reason, so long as he does it for the welfare of the child. . . ."); *Steber v. Norris*, 206 N.W. 173, 175 (Wis. 1925); *State ex rel. Burpee v. Burton*, 45 Wis. 150, 155-56 (1878); *Curtiss*, 300 P. at 803; *Territory v. Cox*, 24 Haw. 461, 465 (1918).

Thus, like the cases adhering to *Pendergrass,* courts following *Lander* required that school officials act reasonably in their treatment of students.

B. "Reasonableness" in a Given Context Was Assessed in Light of the Totality of the Circumstances.

Under both the *Pendergrass* and *Lander* lines of cases, whether the treatment of a particular student was reasonable was considered in light of the totality of the circumstances surrounding the interaction. Application of the *Pendergrass* test permitted juries to

consider the totality of the circumstances when determining whether a teacher acted with malice towards, or caused lasting injury to, a student. *Dean*, 8 So. at 39 ("In determining the question of the reasonableness of the correction, or the existence of malice, the jury may consider the nature of the instrument used, and all the other attendant circumstances."); *Koonse*, 101 S.W. at 142 (upholding trial court's decision to allow evidence of past treatment as relevant to determining malice in the treatment at bar); *Drum*, 47 S.E. at 422 (finding that "a teacher is liable if, in correcting or disciplining a pupil, he acts maliciously or inflicts a permanent injury"; and finding further that "any act done in the exercise of [a teacher's] authority, and not prompted by malice, is not actionable . . . unless a person of ordinary prudence could reasonably foresee that a permanent injury of some kind would naturally or probably result"); *Thornton,* 48 S.E. at 603; *Harris v. Galilley*, 189 A. 779, 782 (Pa. Super. Ct. 1937) ("It is always a question of fact, for the jury to determine from all the attending circumstances whether a punishment inflicted was reasonable and proper or excessive."); *Ely v. State*, 152 S.W. 631, 632 (Tex. Crim. App. 1912) ("Whether [the treatment] is moderate or excessive must necessarily depend upon the age, sex, condition, and disposition of the child; with all the attending and surrounding circumstances, to be judged of by the jury under directions of the court as to the law of the case.").

Similarly, under *Lander*, while determining whether treatment was "clearly excessive," courts

considered, *inter alia*, the nature of the student's conduct; the student's age, sex, and size; the nature of the treatment; and the mindset of the teacher. *See, e.g.*, *Patterson*, 7 A. at 275; *Stanfield v. State*, 43 Tex. 167, 168 (1875) ("[w]hether [the treatment] is moderate or excessive must necessarily depend upon the age, sex, condition, and disposition of the child, with all the attending and surrounding circumstances, to be judged of by the jury"). For example, in *Tinkham v. Kole*, 110 N.W.2d 258 (Iowa 1961), the Supreme Court of Iowa overturned a trial court's grant of a directed verdict to a teacher who was sued for striking a student. 110 N.W.2d 258, 258-59, 263 (Iowa 1961). The *Tinkham* court considered the acts of a teacher who had ruptured a student's eardrum when he struck that student for failing to take off his gloves quickly. *Id.* at 263. The court concluded that "consideration of the nature of the punishment itself, the nature of the pupil's misconduct which gave rise to the punishment, the age and physical condition of the pupil, and the teacher's motive in inflicting the punishment" could lead a fair-minded jury to find that the conduct was clearly excessive. *Id.* at 261, 263.

C. Historically, Teachers Were Instructed to Act Reasonably Towards Their Students.

Although the common law, and later statutes, imposed restrictions on the treatment of students by teachers, enshrined within the principles of the

teaching profession was the understanding that teacher conduct should be limited to what was reasonable, especially when physical contact with the student was at issue. Indeed, teaching manuals dating back to the nineteenth century have urged teachers to act reasonably with regard to the treatment of their students and use the least restrictive means in doing so. *See, e.g.*, Samuel Read Hall, *The Instructor's Manual: Or Lectures On School-Keeping* 135 (1852) (describing that a teacher's treatment of a student "should be varied with the disposition, age, or circumstances of the scholar, or the nature of his offence. It is undoubtedly true, that corporeal punishment should be the last resort. When everything else fails, you may have recourse to that."); Alanzo Potter & George B. Emerson, *The School and the Schoolmaster: A Manual for the use of Teachers, Employers, Trustees, Inspectors, &c., &c of Common Schools* 281 (1873) (describing that a teacher "should endeavour to be reasonable, and should treat [the students] as reasonable beings"); John T. Prince, *Courses and Methods: A Handbook for Teachers of Primary, Grammar, and Ungraded Schools* 330-31 (1896) (describing the pitfalls of acting unreasonably, and noting that if teachers make decisions "in a hasty way, considering them after they are given rather than before, or if [their] decisions are arbitrary, with no apparent justice in them even to the child himself, there will be much opposition on his part, not only to [their] unjust decisions, but to all decisions [they] may give"); John Swett, *Methods of Teaching: A Handbook of Principles, Directions, and Working Models for*

Common-School Teachers 76 (1883) (suggesting that punishment meted out by the teacher should reasonably fit the offense, and that "'[i]t is a rule in punishment,' . . . 'to try slight penalties at first; with the better natures, the mere idea of punishment is enough; severity is entirely unnecessary. It is a coarse and blundering system that knows of nothing but the severe and degrading sorts.'") (citation omitted).

D. The Limits on the *In Loco Parentis* Doctrine Were Not Reserved for Corporal Punishment Alone and the Lasting and Significant Injury that Would Result from a Strip Search Would Render that Search Unreasonable.

1. The common law assessed the reasonableness of all treatment of students regardless of whether such treatment was corporal punishment.

That Ms. Redding was subjected to a strip search that did not consist of corporal punishment does not change the analysis under the principles of the *in loco parentis* doctrine. The school restrained and strip searched Ms. Redding pursuant to its enforcement of school rules prohibiting the distribution of contraband on school grounds. Under the common law, such treatment of a student was still assessed for its reasonableness regardless of whether corporal punishment was involved. Indeed, common law courts routinely applied the reasonableness test of the *in loco parentis* doctrine to cases involving the enforcement of

school rules generally. *See, e.g.*, *Fertich v. Michener*, 11 N.E. 605, 610-11 (Ind. 1887) (applying *in loco parentis* jurisprudence to the enforcement of a tardiness policy); *see also Fitzgerald v. Northcote*, (1865) 176 Eng. Rep. 734, 736 (Q.B.) (analyzing restraint of a student under *in loco parentis*).

For example, in *Calway v. Williamson*, 36 A.2d 377 (Conn. 1944), the Supreme Court of Connecticut considered the acts of a principal in restraining a student to be unreasonable, where such restraint injured the student. *Id.* at 379. There, a principal restrained a student by placing his weight on the student, which ultimately injured the child. *Id.* at 378. The court used the reasonableness test to assess the principal's restraint of the student, concluding as follows: "There is no distinction in the application of the test between punishment and acts of restraint incident to discipline." *Id.* at 379. It ultimately found the action of the principal unreasonable.

Often actions incident to the enforcement of school rules were analyzed under the *in loco parentis* doctrine, regardless of whether physical punishment was involved. *See, e.g.*, *State v. Vanderbilt*, 18 N.E. 266, 267 (Ind. 1888) (finding that any treatment designed to enforce a rule the teacher lacked authority to impose was in violation of *in loco parentis*); *Fertich*, 11 N.E. at 610-11 (locking student out of schoolhouse to enforce tardiness policy unreasonable); *State ex rel. Burpee*, 45 Wis. at 150 (applying *Pendergrass* test to a student's suspension from school); *Bd. of Educ. v. Helston*, 32 Ill. App. 300, 304 (1889)

(applying reasonableness test to student's suspension from school).

In *Fertich v. Michener,* the court concluded that locking a tardy student out of class, as required by school rules, was unreasonable when enforced on an extremely cold day against a ten-year-old girl where that student suffered frostbite as a result. *Fertich,* 11 N.E. at 610. The court found that schools may promulgate and enforce rules with "due regard . . . to the health, comfort, age, and mental as well as physical condition of the pupils" and that "[n]o rule, however reasonable it may be in its general application, ought to be enforced when to enforce it will inflict actual and unnecessary suffering upon a pupil." *Id.*

2. The nature of the injury often determined the reasonableness of the treatment that caused it.

The reasonableness test of the *in loco parentis* doctrine did not hinge on whether the injurious treatment of children was considered "punishment" by those inflicting such injuries. In no case, even when a teacher invoked a defense of good faith, did a court ask whether the treatment in question was "punishment." Instead, courts focused on the nature of the injury, the proportionality of the treatment to the student's conduct, and the student's age. *Dean*, 30 So. at 39; *Ely*, 52 S.W. at 632. Thus, the *in loco parentis* doctrine not only contemplated its application to cases of treatment other than punishment, but also

took into account the severity of the injury caused by the treatment in question.

Under both the *Lander* and *Pendergrass* lines of cases, the injuries sustained through the strip search of a thirteen-year-old girl would have been cognizable at common law. It is without question that strip searches, when conducted on adolescents, exact lasting injury. *Justice v. City of Peachtree*, 961 F.2d 188, 192 (11th Cir. 1992). As this Court has said, "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). A strip search subjects adolescents, in particular, to great trauma. *Cornfield v. Consol. High Sch. Dist.*, 991 F.2d 1316, 1321 n.1 (7th Cir. 1993); *see also* Melton, *Minors and Privacy: Are Legal and Psychological Concepts Compatible?*, 62 Neb. L. Rev. 455, 486 (1983); *Handbook of Adolescent Psychology* 144 (Adelson ed., 1980). Those subjected to strip searches often suffer from sleep disturbance, inability to concentrate, anxiety, and depression. Steven F. Shatz, *et al.*, *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. Rev. 1, 12 (1991). Such injuries would have constituted lasting injury under a *Pendergrass* analysis and would have rendered such treatment excessive under *Lander.* As a result, the act that caused those injuries would have violated the reasonableness standard under the *in loco parentis* doctrine under both lines of cases.

Thus, regardless of whether Assistant Principal Wilson intended the strip search itself to be punishment, the doctrine of *in loco parentis* would have been relevant to that search because it involved a school official enforcing school policies against a student in such a way that would cause that student serious and lasting injury.

E. Strip Searches Were Inconsistent with the Traditions of the American Educational System, Which Required Teachers to Act Reasonably and to Be Guided By the Values of Decency, Modesty, and Humility.

For centuries, the American educational system had as one of its goals the teaching of skills as well as values, including modesty and decency. Teachers were instructed to impart and personify those values as an example to their students. Given these traditions, it is not surprising that the common law is largely silent on the legitimacy of strip searches in schools. It is respectfully submitted that such an act would have been so abhorrent to traditional educational values in the early days of the republic that this absence is entirely plausible. It is more likely that teachers did not attempt to conduct such searches in schools at all.

1. A central purpose of education was to instill morality and values in children.

Horace Mann, the father of American public education, envisioned education of children as their salvation. William J. Reese, *America's Public Schools: From the Common School to "No Child Left Behind"* 23 (2005). As such, Mann believed education should do more than impart the skills necessary for "read[ing], writ[ing], and keep[ing] common accounts." Horace Mann, *Lectures on Education* 117 (1855). Rather, Mann intended common schools to instill morals and values in students. Horace Mann, *Twelfth Annual Report, in The Republic and the School* 79-112 (Lawrence Cremin ed., 1957) (1848) (arguing that "[m]oral education is a primal necessity of social existence," and that "a community without a conscience would soon extinguish itself").

This moral focus of schooling emphasized the teaching of such values as humility and modesty. *See* Horace Mann, *Lectures on Education* 9 (1855) (explaining that "parental, patriotic, and religious motives" were employed on behalf of his cause); *see also* Arethusa Hall, *A Manual of Morals for Common Schools* 67-71 (1850) (describing the utmost importance of the values of humility and modesty in schools to ourselves and others: "Humility and modesty might, perhaps, with as much propriety, be classed among our duties to others"). Some state statutes have imposed a requirement on teachers to instill such values, and such requirements are still in effect

today in at least one jurisdiction, notwithstanding legal developments since that have rendered the explicit incorporation of religious teachings into public school curriculum clearly unconstitutional. *See* Mass. Gen. Laws. ch. 71, § 30 (2008) (originally enacted Mass. Gen. Laws ch. 19, § 4 (1789)). This statute still provides as follows:

> [A]ll . . . instructors of youth shall exert their best endeavors to impress on the minds of children and youth committed to their care and instruction the principles of piety and justice and a sacred regard for truth, love of their country, humanity and universal benevolence, sobriety, industry and frugality, chastity, moderation and temperance, and those other virtues which are the ornament of human society and the basis upon which a republican constitution is founded . . .

Id.; *see also* Horace Mann, *Twelfth Annual Report*, *supra* at 106 (quoting Massachusetts law); Richard A. Leiter, *50 State Surveys: Education, General* (2007) ("Some early state constitutions . . . specifically state that the government was responsible for the training of children in morals. . . .").

2. Historically, teachers were instructed to instill morals in their students by treating them with benevolence, modesty, and humility.

Since the nineteenth century, teachers have been directed to act with reasonableness in the instruction

of their students. *See supra* Part I.C. Educators have also been trained to treat students with benevolence, modesty, and temperance since the nineteenth century.

> One manual instructed teachers as follows:
>
> > [A] teacher should show the utmost tenderness and encouragement of the timid, the dull, the weakly, the afflicted, and all to whom home circumstances . . . make sympathy and consideration especially needful and welcome. . . . Whenever [the teacher] is satisfied that it is his duty to inflict punishment he should make it clear that he does it unwillingly, sorrowfully.
>
> J. R. Blakiston, *The Teacher: Hints on School Management* 4, 6 (1888).
>
> Another provided the following guidance:
>
> > [T]he fear of having his own rights, in any way, infringed; the suspicion that he may not receive his due, – render a child irritable and contentious; whilst the certainty that he shall himself be treated with entire justice and impartiality, satisfies his mind, composes his spirit, and prepares him to impart, with liberality, what he knows is altogether in his power.
>
> Louisa Hoare, *Hints for the Improvement of Early Education and Nursery Discipline* 61-62 (1846).

Other manuals provided similar instructions to teachers. Julia M. Dewey, *Lessons on Morals: Arranged*

for Grammar Schools, High Schools and Academies 23 (1899) (explaining the importance of cleanliness in attaining the very important "virtues, especially those of purity, modesty, delicacy and decency"); 2 *The Moral Reformer, and Teacher on the Human Constitution* 380 (William A. Alcott ed., 1836) ("Both rewards and punishments should be proportioned to offences. They should be dealt out with all the impartiality a man requires a court of justice.").

Teaching handbooks also encouraged teachers to act so as not to degrade or bring disgrace to their students. John Gill, *Systems of Education: A History and Criticism of the Principles, Methods, Organizations, and Moral Discipline Advocated by Eminent Educationists* 8 (1887) ("Correction of mistakes or faults should not degrade, nor discourage, but stimulate."); *Papers for the Teacher* 187 (Henry Barnard ed., 1861) ("Punishment, whether by words or actions, should not be of a disgraceful character." (quoting Cicero)).

3. Traditional educational values leave little doubt that a strip search of a student by a teacher or school administrator was likely beyond the bounds of acceptable treatment of students.

As the previous discussion shows, teachers were instructed to instill in their students a range of virtues, including modesty. Furthermore, they were to act reasonably with respect to those students in

meting out punishment and enforcing school rules. They were also to refrain from engaging in degrading or disgraceful treatment of their students. It is thus difficult to imagine that within the very schoolhouse where teachers were supposed to impart the virtues of modesty and decency and humility, and where teachers were to treat students with respect and grace and dignity, that teachers might also have the authority to strip and search the very pupils entrusted to their care.

II. MODERN ASSESSMENTS OF THE REASONABLENESS OF STUDENT STRIP SEARCHES ADOPT A TOTALITY OF THE CIRCUMSTANCES APPROACH AS THE APPROPRIATE MEASURE OF THE CONSTITUTIONALITY OF SUCH SEARCHES.

A. Common Law Notions of "Reasonableness" Inform Interpretations of Constitutional Principles.

This Court regularly consults the common law in clarifying the meaning of the Fourth Amendment. *See, e.g.*, *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999); *United States v. Watson*, 423 U.S. 411, 418-20 (1976); *Carroll v. United States*, 267 U.S. 132, 149 (1925). It has recognized that the common law provides crucial insight into "what the Framers of the Amendment might have thought to be reasonable." *Payton v. New York*, 445 U.S. 573, 591 (1980). Searches must be "reasonable" under the Fourth Amendment and analysis of the common law guides

the Court's "effort to give content to [the] term." *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995).

Moreover, it is helpful to look to common law torts "when [this Court] think[s] about elements of actions for constitutional violations." *Hartman v. Moore*, 547 U.S. 250, 258 (2006); *see California v. Hodari D.*, 499 U.S. 621, 624-25 (1991); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 231-32 (1970). With these considerations in mind, it is appropriate to look to the common law with respect to discipline of children as a guidepost for analyzing the constitutionality of strip searches in schools today. *Cf. Ingraham v. Wright*, 430 U.S. 651, 659-60 (1977) (discussing the applicability of common law concepts of corporal punishment under the Eighth Amendment).

Historically, courts have recognized the adaptive nature of the common law standard of reasonableness in tort actions. *See* J. D. Lee & Barry A. Lindahl, *Modern Tort Law: Liability & Litigation* § 3:09, at 40-41 (1994) (describing "reasonableness" as a constantly changing concept that evolves with the norms of society); Henry T. Terry, *Negligence*, 29 Harv. L. Rev. 40, 48-49 (1915) (reasonableness is based on community standards which rely on the "teachings of common experiences" of individuals at the time of the events in question). This reasonableness standard extends to the Fourth Amendment protection from unreasonable searches and seizures. In order to protect individuals, this Court "balanc[es] the need to search against the invasion which the search entails." *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) (quoting

Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967)). This balancing test, however, does not operate in a vacuum; instead, it must comport with evolving societal norms. *See Florida v. Riley*, 488 U.S. 445, 454-55 (1989) (O'Connor, J., concurring) (acknowledging the fluid nature of the reasonable expectation of privacy depends on what "society is prepared to recognize as 'reasonable.'") (quoting *Katz v. United States,* 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

What follows is a review of modern cases and their treatment of the issue of reasonableness in the context of student strip searches in schools, albeit when measured through the lens of the Fourth Amendment's proscriptions. It is respectfully submitted that the modern treatment of the issue resembles the common law's approach: searches of students in schools must be reasonable under the circumstances. This review suggests not only that the common law has informed Fourth Amendment jurisprudence, but also that this same jurisprudence has defined the contours of reasonableness in this context, and thus gives renewed meaning to, and reaffirms, the common law's earlier limitations.

B. Prior to *T.L.O.*, Courts Used the *In Loco Parentis* Doctrine to Extend Fourth Amendment Protections to Students, as Determined by the Totality of the Circumstances.

Prior to this Court's decision in *New Jersey v. T.L.O.*, courts upheld searches conducted by school officials acting *in loco parentis*, requiring that officials review the unique facts and circumstances of each case prior to conducting such searches. *See State v. Baccino*, 282 A.2d 869, 872 (Del. Super. Ct. 1971); *People v. Jackson*, 319 N.Y.S.2d 731, 734 (N.Y. App. Div. 1971) (noting that school officials are *in loco parentis* "to pupils under [their] charge, and may exercise such powers of control, restraint and correction over [those pupils] as may be reasonably necessary to enable [them to] properly perform [their] duties as a teacher and accomplish the purposes of education"); *In re L.L.*, 280 N.W.2d 343, 348-49 (Wis. Ct. App. 1979) (noting the state's interest in the education of children and the state's duty to maintain order). At the same time, students were not afforded full protection against searches under the Fourth Amendment because various courts used a standard of "reasonable suspicion," rather than probable cause. *See State v. D.T.W.*, 425 So.2d 1383, 1386-87 (Fla. Dist. Ct. App. 1983); *People v. Scott D.*, 34 N.Y.2d 483, 488 (1974); *Jackson*, 319 N.Y.S.2d at 736; *In re L.L.*, 280 N.W.2d at 350-51.

The degree of reasonableness needed to justify a search rested upon the articulable and particularized facts of each case. *See D.T.W.*, 425 So.2d at 1386; *Rone*

v. Davies County Bd. of Educ., 655 S.W.2d 28, 30-31 (Ky. Ct. App. 1983); *In re L.L.*, 280 N.W.2d at 351. Factors considered when determining whether the search was reasonable included the child's age and school record, the prevalence and seriousness of the offense, the need to make the search immediately, the reliability of the information used as justification, and the school official's experience with the students. *See D.T.W.*, 425 So.2d at 1387; *A.B. v. State*, 440 So.2d 500, 500-01 (Fla. Dist. Ct. App. 1983); *Scott D.*, 34 N.Y.2d at 489; *In re L.L.*, 289 N.W.2d at 351.

Before *T.L.O.*, a student search was considered reasonable if the school official possessed "reasonable suspicion" founded on knowledge or beliefs regarding a particular student. *See, e.g.*, *M.M. v. Anker*, 477 F. Supp. 837, 842 (E.D.N.Y. 1979), *aff'd*, 607 F.2d 588 (2d Cir. 1979) (holding general suspicion insufficient to support the search of a student); *State v. F.W.E.*, 360 So.2d 148, 149-50 (Fla. Dist. Ct. App. 1978) (upholding a search of a student as reasonable where the school official observed such indicia of intoxication as stumbling, bloodshot eyes, and slurred speech); *Rone,* 655 S.W.2d at 30-31 (holding a search based upon a student's own statements regarding his use, possession, and distribution of drugs, as reasonable); *People v. Singletary*, 37 N.Y.2d 310, 311 (1975) (noting justification for search where based on a tip from a reliable informant who had provided "similar information on five prior occasions," leading to the seizure of drugs in each instance).

Finally, the Second Circuit adopted a "sliding scale" approach in evaluating searches of students. *M.M.*, 607 F.2d at 589 ("[Where] the intrusiveness of the search intensifies, the standard of Fourth Amendment 'reasonableness' approaches probable cause, even in the school context. Thus, when a teacher conducts a highly intrusive invasion such as the strip search in this case, it is reasonable to require that probable cause be present."); *see also Doe v. Renfrow*, 475 F. Supp. 1012, 1024-25 (N.D. Ind. 1979) (finding that a nude search violated a middle school student's Fourth Amendment rights where unsupported by "reasonable cause"), *aff'd*, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981).

C. This Court's Decision in *New Jersey v. T.L.O.* Adopted the Reasonableness Standard as Appropriate in Analysis of Searches of Students Under the Fourth Amendment.

In *T.L.O.*, this Court addressed the question of whether the search of a fourteen-year-old female student's purse by a public school official violated her Fourth Amendment rights. *T.L.O.*, 469 U.S. at 327-28. Recognizing school officials as state actors, this Court rejected the theory of *in loco parentis* and found that the "[Fourth] Amendment's prohibition on unreasonable searches and seizures applie[d] to searches conducted by public school officials." *Id.* at 333, 336-37. At the same time, this Court embraced the common law standard of reasonableness in protecting

children from unreasonable searches by requiring searches of students to be reasonable at the inception of the search and then reasonable in scope. *Id.* at 341-42.

Noting the need to maintain "a certain degree of flexibility in school disciplinary procedures," this Court adopted a reasonableness standard to balance "the child's interest in privacy [against] the substantial interest of [school officials] in maintaining discipline," based on the search's context. *Id.* at 337, 339-41. A two-pronged test was articulated. *Id.* at 341-42. First, the search must be "justified at its inception," meaning that "there are reasonable grounds for suspecting that the search will turn up evidence" of the student's school rule violation. *Id.* Second, the conducted search must be "reasonably related in scope to the circumstances which [initially] justified the [search]," meaning "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). In *T.L.O.*, the student's purse was searched by the assistant principal after a teacher reported T.L.O. smoking cigarettes in the school bathroom. *Id.* at 345. This Court concluded the search in question was "justified at its inception" because the school official had a reasonable suspicion he would find contraband. *Id*. at 345-46. And the scope of the search was reasonable in light of the initial report. *Id.*

D. Circuit Courts Apply a Flexible Reasonableness Standard for Strip Searches.

Over the past three decades, this Court has provided latitude to courts in determining the reasonableness of searches and seizures. *See Illinois v. Gates*, 462 U.S. 213, 252 (1983) (shifting from the rigid analysis under *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969) to "totality of the circumstances"). Although *T.L.O.* did not involve a strip search, seven circuit courts of appeal have interpreted it to apply a reasonableness standard to measure the constitutionality of strip searches of students. *See, e.g.*, *Redding v. Safford Unified Sch. Dist.*, 531 F.3d 1071, 1080 (9th Cir. 2008) (*en banc*); *Phaneuf v. Fraikin*, 448 F.3d 591, 596 (2d Cir. 2006); *Hedges v. Musco,* 204 F.3d 109, 116-17 (3d Cir. 2000); *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 824 (11th Cir. 1997); *Cornfield v. Consol. High Sch. Dist.*, 991 F.2d 1316, 1320-21 (7th Cir. 1993); *Williams v. Ellington*, 936 F.2d 881, 884 (6th Cir. 1991). Various courts have found *T.L.O.* to require school officials to provide a quantum of information as reliable indicia to justify strip searches at their inception. *Cornfield,* 991 F.2d at 1320-21.

For example, the Sixth Circuit found the strip search of two students reasonable only after the school's principal accumulated incriminating information one week before conducting the searches. *Williams,* 936 F.2d at 887. The principal received tips that one of the students possessed a glass vial with white powder

in it; learned that the students "place[d] white powder on their fingers and sniff[ed] it;" compiled teacher observations about those students; and had conversations with the suspected students' parents and guardians, one of whom disclosed that money was missing from his bureau. *Id.* at 882-83. Before conducting the strip search, the principal confronted the suspected students and one of them produced a brown vial. *Id.* at 883. Unable to recover the vial mentioned by the informant, the principal conducted a search of the girls' lockers, books, and other belongings. *Id.* The strip searches were conducted only after an exhaustive search did not yield the vial. *Id.*

Similarly, the evidence compiled by the school officials in *Cornfield* justified the strip search of a sixteen-year-old student where three school employees observed a suspicious bulge in his crotch area. *Cornfield,* 991 F.2d at 1322. This, along with corroborating observations made by school employees and the student's claim that he had "crotched" drugs in the past, amounted to "reasonable suspicion" justifying a strip search. *Id.* at 1322-23.

More recently, the Second Circuit found that a "tip from a fellow student, [the suspected student's] past disciplinary problems . . . the suspicious manner of [the suspected student's] denial, and . . . the discovery of cigarettes in [the suspected student's] purse" were insufficient to establish "reasonable suspicion" to justify a strip search. *Phaneuf*, 448 F.3d at 596. The court held "that as the intrusiveness of the

search intensifies, the standard of Fourth Amendment 'reasonableness' approaches probable cause, even in the school context." *Id.* at 596 (citing *M.M.*, 607 F.2d at 589). In particular, the Second Circuit challenged the reliability of the informant's tip as justifying the search because the principal receiving that tip did not investigate, corroborate, or substantiate it. *Id.* at 598.

Courts have also used a sliding scale to determine whether the strip search of a student by a school official was based on "reasonable suspicion," depending on the object sought. *T.L.O.*, 496 U.S. at 337-38; *Phaneuf*, 448 F.3d at 596. The Seventh Circuit endorsed the use of this distinction when it concluded that "[w]hat may constitute reasonable suspicion for a search of a locker or even a pocket . . . may fall well short of reasonableness for a nude search." *Cornfield,* 991 F.2d at 1321. These courts acknowledge that a robust inquiry with respect to the reasonableness of a strip search is appropriate in recognition of the intrusive nature of such a search, often requiring exigent circumstances to justify it. In fact, seven states have banned strip searches by public school officials explicitly. Cal. Educ. Code § 49050 (West 2006); Iowa Code § 808A.2(4)(a) (2003); N.J. Stat. Ann. § 18A:37-6.1 (West 1999); Okla. Stat. tit. 70, § 24-102 (2005); S.C. Code Ann. § 59-63-1140 (2008); Wash. Rev. Code § 28A.600.230 (2009); Wis. Stat. § 118.32 (2004).

The trend among the courts is to permit schools to engage in strip searches only where there is reasonable suspicion that a student possesses narcotics or weapons, and the school officials have marshaled corroborating and reliable information to confirm these suspicions. As the aforementioned sections make clear, the cases leading up to and following *T.L.O.* adopt the basic common law traditions that informed the analysis of the treatment of students by teachers under the *in loco parentis* doctrine applied to tort law: that the search must be reasonable when viewed in light of the totality of the circumstances.

III. COMMON LAW PRINCIPLES, INFORMED BY MORE RECENT FOURTH AMENDMENT JURISPRUDENCE, COUNSEL THIS COURT TO FIND THAT THE SEARCH OF MS. REDDING WAS UNREASONABLE UNDER THE CIRCUMSTANCES, AND THUS, UNCONSTITUTIONAL.

In the eyes of the common law, through either the *Pendergrass* or *Lander* lines of decisional law, the search of Ms. Redding was unreasonable. When viewed through the prism of more recent jurisprudence under the Fourth Amendment, this search was also wanting.

Courts, under either the common law or more recent Fourth Amendment jurisprudence, assess the reasonableness of the treatment endured by Ms. Redding by school administrators in light of the totality of the circumstances. Here, Ms. Redding was

accused of having prescription drugs on her person by a student under suspicion for that very violation of school rules. Yet Ms. Redding had no disciplinary record and gave the school no other reason to suspect her of the alleged infraction. Despite the lack of any other evidence against her, the school proceeded to insist that she disrobe and expose her breasts and genitalia as a means of absolving herself of the accusations against her. Two hundred years of common law tradition and fifty years of Fourth Amendment jurisprudence do not countenance such conduct when it is disproportionate to the alleged offense, could cause serious and lasting injury, and is not justified by exigent circumstances.

It is respectfully submitted that under the common law, under cases articulating Fourth Amendment jurisprudence leading up to *New Jersey v. T.L.O.*, under this Court's ruling in *T.L.O.*, and under the decisions of circuit courts of appeals construing the reasonableness of strip searches of students under the *T.L.O.* standard, the search of Ms. Redding was unreasonable. And if it was unreasonable, it was unconstitutional.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit Court of Appeals sitting *en banc* should be affirmed.

Respectfully submitted,

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